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R. v. Coban

2021 BCSC 1855

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2021 BCSC 1855 R. v. Coban

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Coban,

2021 BCSC 1855

Date: 20210923

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Registry: New Westminster

Regina

v.

Aydin Coban

Before: The Honourable Madam Justice Devlin

Reasons for Judgment - Discreditable Conduct Application

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Introduction

[1] The accused, Aydin Coban, is alleged to have sextorted an underage girl, A.T., over the internet between January 2009 and October 2012. He is charged with committing the following Criminal Code, R.S.C., 1985, c. C-46 offences during that period:

- a) Count 1: extorting A.T. by using threats to induce her to expose herself or perform sexual acts over the internet, contrary to s. 346(1.1)(b);
- b) Counts 2 and 3: possessing child pornography, including for the purposes of distribution or sale, contrary to ss. 163.1(3) and 163.1(4);
- c) Count 4: child luring of A.T., contrary to s. 172.1(1)(a); and
- d) Count 5: criminal harassment of A.T., contrary to s. 264.

[2] A jury trial is scheduled to commence on January 4, 2022 and is anticipated to last several weeks.

[3] Identification will be a central issue at trial. In this application, the Crown seeks rulings regarding the admissibility of 10 bodies of discreditable conduct evidence related to the accused. The evidence consists primarily of artefacts located on the devices that were found in the residence where Mr. Coban was arrested. The Crown also seeks to tender viva voce testimony from several civilian and police witnesses regarding other criminal activity that they submit Mr. Coban engaged in. They say this activity can be connected to information contained on the devices. Specifically, the Crown seeks to lead evidence of extortions of persons other than A.T. These extortions involve one underage girl and several adult males.

The Crown also seeks to lead evidence related to a fraudulent identification scheme associated with Mr. Coban. Additionally, the Crown seeks to lead evidence of other types of discreditable conduct.

- [4] The Crown acknowledges that several bodies of the discreditable conduct evidence they seek to admit are highly prejudicial; however, they submit the prejudice can be addressed by mid-trial instructions and in the final charge to the jury. The defence does not oppose the admissibility of some of the documents located on the devices in the residence. The defence does, however, oppose the admissibility of the extortions of persons other than A.T. because:
- a) they are highly prejudicial before a jury;
 - b) there are doubts as to whether it was Mr. Coban participating in the other extortions; and
 - c) due to the other evidence of direct associations to the offences against A.T. found on Mr. Coban's devices, extortions of other individuals are unnecessary for the Crown to prove its case.
- [5] The hearing of this application occurred over several days. As its outcome impacts a number of pending applications, I advised counsel of my decision on September 9, 2021 and that more comprehensive written reasons would follow. These are those reasons.

Background Facts

- [6] I will briefly set out the relevant background facts to provide some context for this application. The Crown submits that Mr. Coban persistently sextorted A.T. online, beginning in 2009. Specifically, they say he used 21 aliases over Skype, Facebook, YouTube, and email to communicate with A.T., and then with her family, friends, and teachers. In 2014, 12 devices were seized from Mr. Coban's residence in the Netherlands. The Crown submits that four of these devices contain the central evidence needed to establish Mr. Coban as the operator of these 21 aliases.
- [7] The offences against A.T. occurred between 2009 and 2011 and can be divided into six episodes:
- (1) The first episode occurred in 2009, via Facebook and Skype.
 - (2) The second episode occurred in December 2010 via various Skype, Facebook, and YouTube identities.
 - (3) The third episode occurred from April to May 2011, via another Facebook identity and two YouTube identities.
 - (4) The fourth episode occurred from October to November 2011, via four Facebook identities and an email account.

- (5) The fifth episode occurred between August 2010 and April 2011, via one Facebook identity. The Crown submits that Mr. Coban used this identity to gather information, which he then used to communicate further with A.T. and those associated with her.
- (6) The sixth episode involved six Skype identities over various dates.
- [8] The Crown seeks to introduce ten bodies of discreditable conduct evidence to establish that Mr. Coban is the person who operated the 21 aliases. Identifying Mr. Coban as the perpetrator of the communications is the central issue in the Crown's case. The Crown submits these ten blocks of evidence are relevant to the issue of identification because they:
 - a) strengthen the Crown's circumstantial identification case;
 - b) link the occupant of Mr. Coban's residence to relevant content on the devices;
 - c) link Mr. Coban personally to relevant content on the devices;
 - d) help place the evidence that was located on the four devices in Mr. Coban's home in its proper context; and
 - e) rebut innocent explanations that may be offered for the presence of the incriminating evidence on the devices in Mr. Coban's residence.

The Governing Legal Principles

- [9] The law that governs this application is undisputed. Counsel referred to the relevant law as set out in a number of Supreme Court of Canada cases, including *R. v. Arp*, [1998] 3 S.C.R. 339 [Arp], *R. v. Handy*, 2002 SCC 56 [Handy]; *R. v. Mahalingan*, 2008 SCC 63 [Mahalingan] and *R. v. Calnen*, 2019 SCC 6. Counsel also referred to several other cases that apply the principles derived from these Supreme Court of Canada cases, which I have considered, including: *R. v. Sipes*, 2011 BCSC 640 [Sipes]; *R. v. MacCormack*, 2009 ONCA 72 [MacCormack]; *R. v. Roks*, 2011 ONCA 526 [Roks]; *R. v. Riley*, [2009] O.J. No. 1374. I have also considered *R. v. Luciano*, 2011 ONCA 89 [Luciano] and *R. v. Capewell*, 2020 BCCA 82, (leave to appeal ref'd [2020] S.C.C.A. No. 125) [Capewell].
- [10] At paras. 36-74 of *Sipes*, Justice Smart comprehensively reviewed and summarized the law governing the admissibility of discreditable conduct evidence. This evidence is also known as propensity evidence, extrinsic misconduct evidence, disposition evidence, and similar fact evidence. With his analysis in mind, I will briefly summarize the principles that must govern my analysis.

Law Applicable to Discreditable Conduct Evidence

- [11] Evidence of discreditable conduct is presumptively inadmissible: see Handy at para. 55; Sipes at para. 45. An accused's guilt, if it is proven, is to be proven "by evidence of what the accused did, not by evidence of the kind of person the accused is": Roks at para. 87. Courts will not exclude relevant evidence merely because it tends to show the accused is of bad character, but they will exclude such evidence if it shows nothing more than the accused's bad character: Roks at para. 89.
- [12] The discreditable conduct rule is broad in scope. The same rules of evidence apply to discreditable conduct whether the conduct in question is similar to the charged offence or not. As Justice Charron explained in Mahalingan, the rule extends both to similar fact evidence and to "criminal or otherwise discreditable acts that bear no similarity to the offence with which the accused is charged" (at para. 160, concurring in part). In other words, the same rule applies to "all evidence of discreditable conduct that falls outside the scope of the indictment": Mahalingan, at para. 161. This includes "conduct that occurs before, at the same time or after the conduct that forms the subject-matter of the charge": Luciano at para. 218.
- [13] The onus is on the Crown to satisfy the trier of fact, on a balance of probabilities, that it has overcome this exclusionary presumption in the context of the particular case: see Handy at para. 55. Evidence of an accused's discreditable conduct may be admissible if the Crown demonstrates on a balance of probabilities that:
- a) the evidence is relevant to a live issue at trial (other than to demonstrate the accused's bad character or disposition to commit discreditable acts);
 - b) the evidence is material; and
 - c) the evidence's probative value in relation to the particular issue outweighs the prejudicial effects of its admission.

(Handy at para. 55; Sipes at para. 49; Luciano at para. 227.)

Relevance and Materiality

- [14] Relevance is "not an inherent characteristic of any item of evidence"; rather, relevance exists as a relationship between the proposed item of evidence and the fact the proponent seeks to establish by its admission: Luciano at para. 204. Evidence is relevant where "it renders the fact it seeks to establish slightly more or less probable than it (the fact) would be without the evidence, through the application of everyday experience and common sense": Luciano at para. 204.
- [15] Materiality is also a relative concept. Evidence is material if it is offered to prove or disprove a matter in issue in the case: Luciano at para. 207.

- [16] Evidence is prohibited if it merely shows that the accused is the kind of person who is likely to have committed the offence charged. In other words, discreditable conduct evidence will be inadmissible where it is adduced only to show that the accused is a bad person or has the propensity to commit crime: Sipes at para. 45 (citing Mahalingan at para. 159); Handy at para. 31.

Probative Value

- [17] Like relevance and materiality, probative value "does not exist in the abstract": Luciano, at para. 230. To determine whether evidence is probative, a court must assess the relevance and materiality of the proposed evidence in relation to a particular "issue in question" in the case: Handy at para. 69.
- [18] The probative value of similar fact evidence is "driven by the connectedness of the similar fact evidence and the offence alleged": Capewell at para. 80 [emphasis in original]. Justice Abrioux's analysis in Capewell is instructive on this point:
- [81] In Handy at para. 82, the Supreme Court of Canada set out a non-exhaustive list of factors connecting the similar facts to the circumstances set out in the charge, which may exist (but will not be necessary in every case), including:
- (1) proximity in time of the similar acts;
 - (2) extent to which the other acts are similar in detail to the charged conduct;
 - (3) number of occurrences of the similar acts;
 - (4) circumstances surrounding or relating to the similar acts;
 - (5) any distinctive feature(s) unifying the incidents;
 - (6) intervening events;
 - (7) any other factor which would tend to support or rebut the underlying unity of the similar acts.

[Citations omitted.]

- [82] While the degree of similarity required to establish the probative value of the evidence depends on context, "it is not an invariable requirement that there be a strong peculiarity or unusual distinctiveness underlying the events compared": R. v. J.M., 2010 ONCA 117 at para. 91; see also Handy at para. 81; R. v. Burman, 2015 BCCA 519 at para. 64. If, unlike this case, the purpose of the evidence was to prove identity, distinctive features amounting to a "signature" may be required: R. v. Cresswell, 2009 ONCA 95 at para. 9. This is because the required degree of similarity is "particularly high" where similar fact evidence is led to prove identity: R. v. Butorac, 2013 BCCA 421. By contrast, a lesser degree of similarity may be sufficient where the similar fact evidence is relied upon to establish the actus reus of an offence: Cresswell at para. 9.

[Emphasis added].

[19] As Justice Abrioux explains, where evidence of similar acts is offered to prove the identity of the person responsible for a crime, a high degree of similarity between the tendered acts and the offence charged is required to render the likelihood of coincidence objectively improbable, justifying the reception of the evidence: *Arp* at para. 43. As the Supreme Court of Canada remarked in *Arp*, "where the evidence shows a distinct pattern to the acts in question, the possibility that the accused would repeatedly be implicated in strikingly similar offences purely as a matter of coincidence is greatly reduced" (at para. 43). The Court went on to provide some examples of the degree of similarity that is necessary to admit similar fact evidence on the issue of identity (at para. 45):

Where, as here, similar fact evidence is adduced on the issue of identity, there must be a high degree of similarity between the acts for the evidence to be admitted. For example, a unique trademark or signature will automatically render the alleged acts "strikingly similar" and therefore highly probative and admissible. In the same way, a number of significant similarities, taken together, may be such that by their cumulative effect, they warrant admission of the evidence. Where identity is at issue ordinarily, the trial judge should review the manner in which the similar acts were committed -- that is to say, whether the similar acts involve a unique trademark or reveal a number of significant similarities. This review will enable him or her to decide whether the alleged similar acts were all committed by the same person. This preliminary determination establishes the objective improbability that the accused's involvement in the alleged acts is the product of coincidence and thereby gives the evidence the requisite probative force. Thus, where the similar fact evidence is adduced to prove identity, once this preliminary determination is made, the evidence related to the similar act (or count, in a multi-count indictment) may be admitted to prove the commission of another act (or count).

[20] As Justice Watt emphasized in *MacCormack*, however, "a signature is not required in every case" (para. 51).

Prejudicial Effect

[21] The prejudicial effect of discreditable conduct evidence is sometimes misunderstood. Prejudice does not mean that the evidence will strengthen the Crown's case against the accused and increase the likelihood of conviction (a result that "merely demonstrates the probative value of the evidence": *Sipes* at para. 59). Rather, prejudice is the risk that the trier of fact will misuse the evidence: *Sipes* at para. 59. In *Handy*, Justice Binnie discussed prejudice in terms of reasoning prejudice and moral prejudice.

- [22] Reasoning prejudice is the risk that the jury will be confused or distracted from the charge against the accused: Handy at para. 100. Discreditable conduct generates reasoning prejudice by "distract[ing] jurors from their proper focus on the charge particularized in the indictment and lengthen[ing] the trial process": Luciano at para. 220. It also creates a risk "that the discreditable conduct may result in such condemnation or disgust by the jury so as to prevent it from assessing the evidence rationally and dispassionately": Sipes at para. 62.
- [23] Moral prejudice is "the potential stigma of 'bad personhood'": Handy at para. 100. It concerns the risk "that the [trier of fact] will convict an accused for his or her conduct on other occasions rather than the occasion for which they are charged" (Sipes at para. 63) or "punish the accused for prior misconduct by finding him or her guilty of the offence charged" (Luciano at para. 116). In other words, it is the risk that a "trier of fact may follow a chain of reasoning the law forbids - inferring of guilt from general disposition or propensity", leading the accused to be "convicted because of what he is, rather than what he did": Luciano at para. 219. As Smart J. explained at para. 64 of Sipes, the risk of moral prejudice is highest when the discreditable conduct is similar to the conduct the accused is charged with:

Moral prejudice is highest when the discreditable conduct demonstrates a propensity to engage in the same kind of conduct as that charged on the indictment. This is so because as a matter of logic, common sense and human experience, the fact that someone has committed the same offence on other occasions is logically probative of whether they committed the charged offence.

Balancing

- [24] Once I have assessed the probative value and prejudicial effect of the evidence, the final stage of the analysis involves balancing (or a "cost-benefit analysis"): Sipes at para. 72; Luciano at paras. 226-235. Evidence of discreditable conduct is only admissible where the benefit outweighs the cost of its admission.
- [25] When it comes to balancing the probative value and prejudicial effect of evidence, I am mindful of the caution that Binnie J. expressed at para. 150 of Handy:

Justice is achieved when relevant evidence whose prejudice outweighs any probative value is excluded and where evidence whose probative value exceeds its prejudice (albeit an exceptional circumstance) is admitted. Justice includes society's interest in getting to the truth of the charges as well as the interest of both society and the accused in a fair process. A criminal justice system that has suffered some serious wrongful convictions in part because of misconceived notions of character and propensity should not (and does not) take lightly the dangers of misapplied propensity evidence.

- [26] I am also mindful of the cumulative effect of admitting multiple pieces of discreditable conduct evidence - or as Smart J. described it at para. 147 of Sipes, the risk of "piling on". The cumulative effect of such evidence can be significantly prejudicial because "the impact of the whole of the evidence is greater than the sum of its parts": Sipes at para. 82. Mindful of

this risk, I have been careful not to admit more discreditable conduct evidence than is necessary, and I have excluded evidence with some probative value where other, less prejudicial evidence could provide a similar benefit: Sipes at para. 147.

Jury Instructions

- [27] As the accused in this case has elected to proceed by way of a jury trial, I must presume that the jury will follow my instructions about the limited use that may be made of propensity evidence. However, I must also "assess the risk with each piece or item of discreditable conduct that limiting instructions may not be adequate to overcome the prejudicial effect of the evidence": Sipes at para. 70.
- [28] With these legal principles in mind, I turn to my analysis.

Analysis

- [29] I will conduct my analysis with reference to the index of the Crown's Book of Materials, filed as Exhibits 1 and 2 at this hearing.

Tab 1 - Uzunin5@gmail.com Email

- [30] The Crown seeks to introduce evidence of a deleted text located on Device 1 in Mr. Coban's residence as similar fact evidence. The email text was located in the slack space of another carved deleted file. The date is unknown. Within the text, the email address `uzunin5@gmail.com` was located. The Crown submits this email address is similar to the email address `uzunin3@gmail.com`, from which the "Katie Hutchkins" email, sent to staff and administrators at A.T.'s school on November 1, 2011, originated.
- [31] While I acknowledge the email addresses are similar, there are also a number of dissimilarities between the two emails. The `uzunin5` email is very brief, lacking the detail contained in the Katie Hutchkins email. The `uzunin5` email describes receiving a picture with K.P. "flashing her tit on BlogTV or something" and that there is also a video, although it is unclear what the links actually revealed. In contrast, the Katie Hutchkins email contains a detailed description of what A.T. was purported to have done, with links to videos, screenshots, and photographs.
- [32] I am not satisfied that the Crown has established the requisite degree of similarity to admit this evidence. As Justice Watt explained in *MacCormack*, where similar fact evidence is offered to prove identity in a criminal case, "the degree of similarity required among the offences to negate the improbability of coincidence [is] best captured by the phrase 'strikingly similar' or some near equivalent": *MacCormack* at para. 42. This high degree of similarity can manifest as either "a unique trademark or signature common to all incidents" or as a "number of significant similarities in combination": *MacCormack* at para. 51. Neither is present in this case. While there is some generic similarity between the `uzunin3` and `uzunin5` emails, there are also numerous, significant dissimilarities that dilute their

probative value and compound their potential prejudicial effect: MacCormack at para. 66; Handy at para. 127.

- [33] Further, in my view, the lack of context is potentially confusing and the text has no probative value. Therefore, the Crown is not permitted to tender this evidence at trial.

Tab 2 - Explanation of the kw.dat and txt.file

2(i) kw.dat file

- [34] A text file named kw.dat listing user names and email accounts was located on Device 2. The defence does not oppose the admission of this evidence. The Crown is permitted to tender this evidence through Sgt. Hack at trial.

2(ii) new.txt file

- [35] This is a text file containing email addresses and Skype addresses found on a device located at Mr. Coban's residence. The defence does not oppose the admission of this evidence. The Crown is permitted to tender this evidence at trial.

2(iii) video clip from cody - Notepad

- [36] The video clip located on the device demonstrates how the user makes use of the content of the text files. In this particular video clip, the user highlights the email address marccamerons@yahoo.com. While this video clip is of minimal probative value, its admission is not prejudicial. Therefore, the Crown is permitted to tender this evidence at trial, subject to editing out "im 14 is that ok".

2(iv) video stills showing unsavory .txt files

- [37] I note that the document at Tab 2(iii) is the same as the document on page 15 of Tab 2(iv). The Crown seeks to tender these video stills to demonstrate how the user of the text files copies the information and pastes it into other messages. I agree with defence counsel that other than the video clip on page 15 (which is the same as Tab 2(iii) above, and which I have already ruled admissible), the text being copied and pasted into conversations are not any of the words, phrases, or aliases used in the A.T. incidents. Further, these video stills suggest the user was recording his online activity; however, there is no evidence that the activity directed at A.T. was recorded. Thus, I agree with defence counsel that the prejudicial effect associated with these video stills would far outweigh any probative value. Therefore, the Crown will not be permitted to tender this evidence at trial, although they are permitted to have a witness explain how an individual would generally use .txt files.

Tab 3 - The Aydin Coban Adult Male Sextortion Message

- [38] The Crown seeks to tender a text message located on Device 2. There is no evidence that the text was sent or received, only that the text was present on the computer between 2012-09-15 and 2012-09-17. The text provides information on how to send 2,000 Euros through Western Union to the recipient, Aydin Coban, in the Netherlands. The text appears to be written by a third person and states "after he confirms he got it, I will email you and delete everything related to you so we can end this ordeal".
- [39] The Crown seeks to tender this evidence for several reasons. Firstly, the text creates a direct link between the name Aydin Coban and the device in September 2012. This is important because it is after the offences pertaining to A.T. occurred and it will assist in refuting any suggestion that someone else must have possessed the device prior to 2012. Secondly, the message is highly similar in both content and formatting to messages sent in the Sam extortion body of evidence discussed later in these reasons. Further, this message when considered together with the Sam extortion messages will serve to link Mr. Coban to the user of other aliases/usernames listed in the kw.dat file.
- [40] The Crown submits this message relates to the sextortion of an unknown adult male. While the message does suggest that payment to Aydin Coban will "end this ordeal", it is purely speculative to suggest the "ordeal" referenced is any type of extortion or sextortion. There is simply no context to inform what exactly is being discussed or what, if any, role Aydin Coban played. As will be discussed later in these reasons, I have determined that the Sam sextortion messages are not admissible at trial; therefore, the Crown's reliance on similar fact evidence as a basis for admission of this message is not viable.
- [41] Given that Device 2 was located in Mr. Coban's residence, there is other evidence to link the device and its contents to Mr. Coban without reliance on this message. I find that this message lacks probative value and therefore is not admissible at trial.

Tab 4 - Marc Camerons Adult Male Sextortion Messages

- [42] The Crown seeks to introduce ten deleted messages found on Device 2 purported to be written by Marc Camerons or his representative. Marc Camerons identifies himself as the father "of the 14 year old boy you solicited [sic] and engaged in sexual activities with on webcam". The Crown submits these messages are all in furtherance of sextortion offences against adult males. Message 2 appears to be identical to a series of messages located in the Mel Raine Facebook account at Tab 4(ii).
- [43] The name Marc Camerons is a Facebook alias used to sextort and lure A.T. The Crown submits that if it establishes Marc Camerons as the user of Mr. Coban's devices, this is identification evidence in relation to five aliases used to sextort and lure A.T. The Crown acknowledges this evidence, which depicts the extortion of an adult male and solicitation of an underage boy, will cause significant moral prejudice, as it is both discreditable and illegal. It concedes that it will be necessary to instruct the jury not to engage in

impermissible reasoning.

- [44] The defence's primary position is that this evidence is inadmissible. In the alternative, the defence submits that the admission of the evidence should be limited so that the jury is made aware that the devices contained messages from Marc Camerons but without being made aware of the content. They submit the jury could also hear evidence as to how Marc Camerons is linked to other aliases.
- [45] I agree with the Crown that the existence of the Marc Camerons messages do have probative value; however, I find that the actual content of the messages pertaining to the solicitation of an underage boy is not necessary and would serve to distract the jury from their proper focus on the offences charged. It may also lead to impermissible inferences that Mr. Coban, as a result of his involvement in other sextortions, was more likely to have sextorted A.T.
- [46] I find that the Crown may tender this evidence subject to the limitations explained in the following subsections:

4(i) Deleted Text Messages from Device 2

- [47] The content of these ten messages is not admissible, but the Crown is permitted to lead evidence that ten messages were located on the devices, which referred to Marc Camerons and provided various email accounts for contact: marccamerons@hushmail.com, marccameronsss@yahoo.com, marccamer@yahoo.com, marccameronss@yahoo.com and tylercarnuinyou@yahoo.com. With respect to message 2, the Crown is permitted to lead evidence that this message contains reference to Robert Trevathan contacting Marc Camerons.

4(ii) Mel Raine Facebook Account Record with Marc Camerons Adult Male Sextortion Message

- [48] As with the items located at tab 4(i), the Crown will not be permitted to lead evidence of the actual messages but can lead the fact that the Mel Raine Facebook records contained a series of messages requesting either Robert Trevathan or another person contact Marc Camerons. The Crown is also permitted to tender the details pertaining to the registered name, email, and addresses associated with the Facebook account and how these names are linked to other aliases.

Tab 5 - The Fraudulent Possession of Financial Instruments and ID Documents

- [49] The Crown seeks to introduce evidence of Mr. Coban possessing financial instruments and identification documents not in his own name. The Crown seeks to lead evidence from Dutch police officers that on December 21, 2013 they executed a covert search of Mr. Coban's residence where they located various documents and credit cards in the names of three Dutch civilians. The Crown seeks to call viva voce evidence from these three Dutch civilians that they had dealings with a male who provided each of them with a photocopy of his passport, and that the passport included a photograph of Mr. Coban. The Crown does not intend to elicit any evidence regarding the actual fraud Mr. Coban conducted - they only

seek to establish that these civilians dealt with Mr. Coban, provided him with their identification, and did not create Skrill accounts in their own names. The Crown also seeks to call Dutch police officers and an expert witness to explain the Skrill money transfer system and the accounts related to these civilians.

- [50] The Crown submits the probative value of this evidence is that it connects Mr. Coban to the Skrill accounts in the name of Marc Camerons, and it connects him to the Dutch civilians. In addition, this evidence provides further links between Mr. Coban and the aliases listed on the kw.dat file.
- [51] I find that the prejudicial effect of this evidence far outweighs any probative value. I agree with defence counsel that this body of evidence is convoluted, would occupy a significant amount of court time, and would distract the jury from their consideration of the offences pertaining to A.T. Therefore, the Crown is not permitted to tender any of this evidence at trial.

Tab 6 - The X.X. Male Sextortion

- [52] The Crown seeks to tender the deleted text of what appear to be a series of emails in August 2012 between an adult male, X.X., and marccamer@yahoo.com, in which X.X. is being sextorted for money. The Crown also seeks to tender a Western Union money transfer payment from X.X. to Aydin Coban and a handwritten note with similar details, which were seized from Mr. Coban's residence.
- [53] The Crown submits that these messages together with the documents provide further evidence that Mr. Coban used Marc Camerons as an alias.
- [54] I agree with defence counsel that this evidence, which involves an unrelated sextortion of an adult male for money, is highly prejudicial and would engage both moral and reasoning prejudice. However, I acknowledge that the reference to Marc Camerons does have probative value, particularly when considered together with the Marc Camerons messages located at Tab 4, which I discussed earlier in these reasons.
- [55] In order to minimize the prejudicial effect of the messages, the Crown is not permitted to tender the content of the messages, but they are permitted to tender evidence that there was a series of messages located on the device in the specific period in 2012 from Marc Camerons at marccamer@yahoo.com or marccameronsss@yahoo.com. They are also permitted to tender evidence linking these email addresses to those associated to the messages at Tab 4 and other aliases.

Tab 7 - The C.B. Underage Girl Luring Sextortion (Exhibit 2)

- [56] The Crown seeks to tender evidence regarding the luring and sextortion of C.B. as similar fact evidence. The Crown submits it is objectively improbable that two different people committed the acts against C.B. and the acts against A.T.

- [57] There are two components to the C.B. evidence. First, the Crown seeks to tender evidence of deleted screen capture videos and still images from June and July 2012 that were discovered on Device 2. These include video clips in which a Skype user, using the name Dylan Polo, engaged in sexually explicit chats with C.B. The Skype user requested nude photos from C.B., who complied. The user Dylan Polo is seen examining the photos and then saving them to a computer folder with C.B.'s name. During the chat, C.B. says she is 14 years old and the user says he is 19 years old.
- [58] The second component of this evidence consists of Facebook messages from the accounts of Brandoons Fathr and Brandns Fathr.
- [59] The Crown submits the C.B. luring and sextortion is strikingly similar to the luring and sextortion of A.T. The Crown submits the similarities include:
- a) Both engaged in grooming or luring using a friendly Skype alias. With A.T., it was kelseyrain2 and with C.B., it was Dylan Polo;
 - b) Both targeted a 14 year old girl;
 - c) A.T. was contacted by Daimon Luci on Facebook demanding she give him her Skype address. C.B. was contacted by Brandoons Fathr on Facebook, who demanded she add him to her Skype;
 - d) The A.T. perpetrator threatened to send explicit content to A.T.'s school, friends, family, and child protection agencies and then sent links or images. The C.B. perpetrator made the same type of threats; and
 - e) The A.T. perpetrator demanded that A.T. perform three explicit acts on camera. The C.B. perpetrator demanded three explicit photos.
- [60] The defence submits that consideration of the generic similarities between the proposed similar acts and the offence actually masks the significant dissimilarities between the two.
- [61] With respect to the Skype messages, I agree with defence counsel that there is a significant difference when comparing the contact between Dylan Polo and C.B. against the contact between Kelsey Rain and A.T. While Kelsey Rain presented as a young girl interested in "camming", which is a reference to masturbating on camera, with A.T., Dylan Polo presented as a 19-year-old male who expressed his sexual fantasies to C.B. in exchange for her nude photos. While C.B. is underage, there is nothing in the exchange to suggest she was extorted into providing the photographs. Another significant difference is Dylan Polo obtained photographs directly from C.B. but there is no evidence that Mr. Coban obtained nude photos of A.T. directly from her.

- [62] The C.B. video also depicts a folder in C.B.'s name where the user placed the explicit photos. As I understand the Crown's position, they seek to rely on this evidence to argue that the folder bearing A.T.'s name contained child pornography of A.T., despite the fact that there was no evidence of what those folders may have contained. I agree with defence that the content of the C.B. folder does not support the inference that the folder with A.T.'s name must have contained similar content.
- [63] In my view, the Crown has not proved a sufficiently "high degree of similarity" between the C.B. and A.T. extortions to render "the likelihood of coincidence objectively improbable": Arp at para. 43. While there are some generic similarities between the A.T. and C.B. extortions, no striking similarities nor distinct patterns emerge; rather, the dissimilarities loom large. While "[n]ot every dissimilarity is fatal", significant dissimilarities "may dilute probative strength and, by compounding the confusion and distraction, aggravate the prejudice" associated with discreditable conduct evidence: Handy at para. 127.
- [64] The deleted videos of C.B. engaging in chats with Dylan Polo are highly prejudicial. These engage both moral and reasoning prejudice: The exchanges and the images are disturbing, and they would likely lead the jury to impermissible propensity reasoning. The significant dissimilarities between the C.B. and A.T. extortions would likely only aggravate any such prejudice. In my view, despite the jury's ability to adhere to the instructions they are given, the prejudicial impact of these images cannot be satisfactorily addressed through jury instructions. Therefore, none of the video stills or video clips contained in Exhibit 2, Tabs (i) to (iv) are admissible at trial.
- [65] I also have similar concerns regarding the Brandoons Fathr and Brandns Fathr Facebook exchanges with C.B. In these messages, C.B. is sextorted and lured. One of the images of C.B. is distributed to her relatives. While I accept that there are some similarities between what occurred with A.T. and C.B., there are also some important differences. In particular, in the exchanges with C.B., the perpetrator (Brandoons Fathr) insists C.B. refer to him as her "owner" while she is his "pet". The perpetrator instructs C.B. that there are certain rules she must obey in their relationship. This pet/owner theme is absent in the evidence pertaining to offences against A.T. In my view, this is an important difference. This difference detracts from the Crown's submission that the same person wrote both series of messages. I also note the difference in the frequency and duration of the messages. The C.B. messages occur in late November and December 2012, whereas in the case of A.T., there were several messaging episodes over an extended period.
- [66] The Crown submits that the alias brightonsbest1@yahoo.com, provided as a contact email in messages sent by Brandoons Fathr in November 2012, further links Brandoons Fathr and Dylan Polo (the perpetrators of the C.B. sextortion) with the person who sextorted Sam (which I will discuss below). The Crown argues that the Sam sextortion evidence demonstrates that brightonsbest1@yahoo.com is Mr. Coban. Thus, if the trier of fact accepts that the same perpetrator conducted the C.B. and A.T. sextortions, the Sam sextortion evidence links Mr. Coban to both. However, as will be discussed, I have determined that the

Sam sextortion evidence is not admissible at trial.

- [67] While the Brandoons Fathr Facebook messages were primarily with C.B., the perpetrator used the name Brandns Fathr to distribute C.B.'s nude photograph to various of her friends and family. The Crown submits this is similar to the manner in which A.T.'s image was distributed to her family and friends. While I acknowledge that there is some similarity in terms of how the A.T. perpetrator and the C.B. perpetrator contacted the girls' friends and family members, I do not consider this particularly distinctive given the proliferation of online communication platforms.
- [68] In any event, as with the Brandoons Fathr messages, these messages engage both moral and reasoning prejudice. In terms of moral prejudice, there is a risk that the jury will use this evidence to draw the prohibited inference that the accused is the kind of bad person likely to commit the offence charged. I agree with defence counsel that this entire body of evidence is inherently inflammatory and would tend to support an inference of guilt based solely on bad character or propensity. In terms of reasoning prejudice, this body of evidence will be time-consuming and may distract the jury from the real issues at trial. In particular, it may cause condemnation or disgust, impairing the jury's ability to assess the evidence rationally and dispassionately.
- [69] In addition, if this evidence is permitted to go before the jury, Mr. Coban may be compelled to testify to defend himself against these uncharged allegations, exposing himself to cross-examination when he might otherwise have chosen to remain silent.
- [70] I have determined the probative value of this evidence is outweighed by its prejudicial effect. Therefore, the evidence pertaining to the C.B. sextortion contained in Exhibit 2 is not admissible at trial.

Tab 8 - The Sextortion of Sam

- [71] The Crown seeks to introduce evidence of an adult sextortion scheme involving a male named Sam, which occurred in 2013. The Crown submits the evidence establishes that Sam was sextorted by a perpetrator using the Facebook account Colin Franptom with an email address of brightonsbest1@yahoo.com. The Crown submits the evidence establishes that Mr. Coban operated these accounts, as he is the person who collected one of the extortion payments. The proposed evidence includes viva voce testimony from Sam (if he agrees to testify) who will describe "camming" with an individual who appeared to be a teenage male. In addition to Sam, the Crown seeks to tender the viva voce testimony of two undercover police officers who assumed control of Sam's email account and continued to communicate with the perpetrator.
- [72] The Crown submits that the person operating brightonsbest1@yahoo.com is Mr. Coban. However, the defence argued there is another body of evidence demonstrating that the email brightonsbest1@yahoo.com was communicating with a third party named "Aydin" whose email address was tokaic@gmail.com. The defence explained that the tokaic emails

were extracted from a device seized from Mr. Coban's residence and disclosed to Mr. Coban in relation to another matter. The defence submits the email exchanges establish that brightonsbest1@yahoo.com told "Aydin" (at email tokaic@gmail.com) to pick up money at a Western Union bank and that there is nothing to establish that "Aydin" has any knowledge of Sam nor that "Aydin" participated in the extortion scheme.

- [73] In response, the Crown challenges the admissibility of the tokaic emails, as the Crown is not aware of the source of these materials. I appreciate that the focus of the Canadian police investigation was on securing evidence pertaining to the offences committed against A.T. and that in doing so, they may not have considered the other material located on the devices seized at Mr. Coban's residence. However, once the existence of the tokaic emails was brought to the Crown's attention, it is simply not enough to submit these emails are inadmissible while, at the same time, arguing that because Mr. Coban attended Western Union to collect payment, he is the person who perpetrated the Sam sextortion. I agree with defence that the existence of the tokaic emails detracts from the strength of the link between Mr. Coban and the Sam sextortion.
- [74] Putting aside a consideration of the tokaic emails, I agree with defence counsel that the probative value of this evidence - linking Mr. Coban to the aliases brightonsbest1 and Colin Franptom from the text files - is outweighed by its prejudicial effect. Additionally, the Sam evidence is with respect to an extortion of money from an adult male, rather than an extortion of sexual content from an underage girl. The profound dissimilarities between the A.T. sextortion and the Sam sextortion significantly reduce the probative value of this evidence "to the point of its domination by prejudice" - these profound differences would only compound the jury's confusion and distraction, aggravating the prejudice associated with the evidence: MacCormack at para. 70.
- [75] I also agree with defence counsel that this body of evidence is highly prejudicial and engages both moral and reasoning prejudice. There is a real risk of moral prejudice, because the jury may impermissibly reason that the person who engaged in such offensive conduct with Sam would be the type of person to commit the charged offences. With respect to reasoning prejudice, this evidence would require several additional witnesses that have no direct connection to the A.T. offences, further complicating and lengthening the trial, while distracting the jury from the real issues at trial. The Crown submits that the prejudicial nature of the evidence can be addressed through mid-trial jury instructions and in the final charge to the jury. I disagree. The limiting instructions required, in light of this specific evidence, would "not be adequate to overcome the prejudicial effect of the evidence so that probative value would predominate": Luciano at para. 262.
- [76] In addition, Mr. Coban may be forced to defend himself against these uncharged allegations and thereby forfeit his right to silence.
- [77] In my view the prejudicial impact of this evidence outweighs any probative value. Therefore, the Crown is not permitted to tender any of this evidence at trial.

Tab 9 - The Digital Toolkit

[78] Subject to some editing, the defence is not opposed to this evidence's admission. Therefore, I find that pages 2, 3, 10, 15 and 19 are admissible at trial to demonstrate how a user uses the software. Page 14 is also admissible, subject to editing out the image of the female, the text on the left side of the page, and the top line of the page containing 4 small boxes. The other pages located in Tab 9 are not admissible. The Crown is permitted to have a witness testify to explain what the software permits the user to do (e.g., conceal the user's real IP address, create fake IP addresses, manipulate web cam, etc.)

Tab 10 - Lily Luck Material

[79] The defence is not opposed to the admission of this evidence, with certain limitations. I agree that the Crown is permitted to have a police officer who has viewed the collection of videos found on the computer testify that they all depict the same person without detailing what is depicted in each video. Also, the witness will be permitted to testify that the image associated with Kelsey Rain's profile is the same image depicted in the Lily Luck material.

Conclusion

[80] My ruling in this application is based on the anticipated evidence and anticipated live issues at trial. This creates a certain degree of uncertainty. As noted in Sipes at para. 93, due to the difficulties and uncertainties associated with advance rulings, it may be necessary to revisit some of these rulings depending how the evidence unfolds at trial. Therefore, some aspects of these rulings may be subject to reconsideration, depending on the evidence at trial.

"Devlin J."

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